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# Roy M. Helm v. Utah State Highway Patrol Civil Service Commission : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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13 JUN 1977

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

ROY M. HELM,

Plaintiff  
and Petitioner,

v.

UTAH STATE HIGHWAY PATROL  
CIVIL SERVICE COMMISSION  
and RAYMOND A. JACKSON,  
Utah Commissioner of  
Public Safety,

Defendants  
and Respondents.

Case No. 14450

RESPONDENTS' BRIEF

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FILED

JUN 15 1976

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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ROY M. HELM,

Plaintiff  
and Petitioner,

v.

UTAH STATE HIGHWAY PATROL  
CIVIL SERVICE COMMISSION  
and RAYMOND A. JACKSON,  
Utah Commissioner of  
Public Safety,

Defendants  
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## STATEMENT OF THE NATURE OF THE CASE

Certiorari was granted in this case on petition to this Court to review one provision of an order of the Highway Patrol Civil Service Commission which indefinitely suspended petitioner.

## DISPOSITION BEFORE THE HIGHWAY PATROL CIVIL SERVICE COMMISSION

Petitioner was indefinitely suspended from the Utah Highway Patrol with certain conditions for possible reinstatement.

## RELIEF SOUGHT ON CERTIORARI

Petitioner seeks to have a portion of his suspension order modified which relates to his possible future employment.

## STATEMENT OF FACTS

Petitioner's Statement of Facts adequately sets forth the facts in this case.

## POINTS ON APPEAL

PETITIONER HAS NO STANDING TO CHALLENGE THE SUBJECT ORDER AS HE HAS NOT BEEN INJURED BY IT AND MAY NEVER BE INJURED BY IT.

Petitioner, at page 9 of his brief, concedes that he does not contend that the Commissioner of Public Safety has acted or is about to act

in a partial or improper manner. Absent such proof that he is likely to do so, it must be assumed by this Court that the actions of the Commissioner will be proper and in accordance with law. In the event the Commissioner's future determination is objectionable, the petitioner would then have recourse to the Commission itself to determine whether the Commissioner had acted properly and if the Commission upheld the challenged action then such an appeal as this would be in order, but not before then. At the present time, the petitioner has no standing as he has not been injured by the subject order. Petitioner may not properly ask this Court to speculate as to what the Commissioner may do in the event a decision by him on this problem is called for in the future. The appellate process ought not to be required to conjecture upon speculation to eliminate the risk that the Commissioner "will never even be tempted to be partial." Pride Club, Inc. v. State, 25 Utah 2d 333, 481 P.2d 669.

The case of Hagerman v. Dayton, 147 Ohio St. 313, 170 A.L.R. 199, 71 N.E. 2d 246, is not in point as the delegation there complained of was a check off for dues in a union of public employees by payroll deduction. There the court said (p. 209):

"The law provides for the election and appointment of officials whose duties would be interfered with by the intrusion of outside organizations." (emphasis added).

Here no "outside organization" or individual is involved in the subject order but only the duly appointed Commissioner of Public Safety. There

are no similarities to the case at bar.

Sec. 27-11-10, U.C.A. 1953, upon which petitioner relies as the controlling authority, is not applicable because that section covers the initial employment of members of the Highway Patrol, whereas the petitioner here is not seeking employment as he has already been employed. Subsection (b) of that section would not be appropriate to the instant case as the petitioner obviously would not want petitioner to be considered as one of three applicants for a given position, as he would insist (and properly so) in being selected for the subject position instead of the two other applicants who had not yet been employed by the Highway Patrol. In short, respondents contend that there is no provision of law which covers this situation, namely who should decide where a suspended member of the Patrol should be employed upon his reinstatement. In the absence of such a controlling statute, it is reasonable and therefor lawful for the Commission to make that decision.

## II

THIS APPEAL IS PREMATURE AS THE SUBJECT ORDER HAS NO FORCE OR EFFECT UNTIL FURTHER EVENTS MAY OCCUR AND IF THEY DO, THE PETITIONER HAS EXHAUSTED HIS ADMINISTRATIVE REMEDIES CONCERNING ITS APPLICATION.

As noted above, petitioner does not and cannot claim any injury to him as a result of the subject order.

If and when petitioner can make such a claim by reason of events occurring hereafter, petitioner would be required to exhaust his administrative remedies before seeking relief through this Court.



Before an appeal would properly lie to this Court, at least the following two events would need to occur:

(1) a determination by the Commission that petitioner had overcome his drinking problem,

(2) the Commission would have to determine that the Commissioner's decision with respect to the rank or rating and position was a proper one.

The subject order was a final one with respect to the indefinite suspension, but it is not a final order with respect to the future employment, if any, of petitioner by the Patrol and hence not appealable.

The Wisconsin Supreme Court in the case of Wisconsin Telephone Co. v. Wisconsin Employment Relations Board, et al., 34 N.W. 2d 844, cited favorably from 42 Amer. Jurisprudence, Sec. 196, pp. 577 to 579, as follows:

"Courts are averse to review interim steps in an administrative proceeding. Whether review is sought in nonstatutory or statutory proceedings, review of preliminary or procedural orders is generally not available, primarily on the ground that such a review would afford opportunity for constant delays in the course of administrative proceedings for the purpose of reviewing mere procedural requirements or interlocutory directions. Broad language of statutes providing for judicial review or orders of regulatory commissions has been construed as not extending to every order which the commission may make, and mere preliminary or procedural, as distinguished from final, orders have been held not to be within such statutes, especially where the context of the provision indicates that the orders for which review is provided are such as are of a definitive character dealing with the merits of a proceeding and resulting from a hearing upon evidence and supported by findings. \* \* \* Statutory review has been denied by the courts where, although

the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, this result will follow only if some further action is taken by the administrative authority, on the theory that the order sought to be reviewed does not of itself adversely affect the complainant, but only affects his rights adversely on the contingency of future administrative action." 42 Am. Juris., Sec. 196, pp. 577-578; Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 385, 58 S.Ct. 963, 82 L.Ed. 1408; Rochester Tel. Corporation v. United States, 307 U.S. 125, 129, 131, 59 S.Ct. 754, 83 L.Ed. 1147; Shannahan v. United States, 303 U.S. 596, 58 S.Ct. 732, 83 L.Ed. 1039; National Labor Relations Board v. Falk Corporation, 308 U.S. 453, 60 S.Ct. 307, 84 L.Ed. 396; National Labor Relations Board v. International Brotherhood E. W., 308 U.S. 413, 60 S.Ct. 306, 84 L.Ed. 354; Delaware and H. Corporation v. United States, 266 U.S. 438, 45 S.Ct. 153, 69 L.Ed. 369.

### III

THE HIGHWAY PATROL CIVIL SERVICE COMMISSION DID NOT ERR IN LEAVING ANY DISCRETION TO THE COMMISSIONER OF PUBLIC SAFETY AS TO RATING, RANK OR POSITION TO BE GIVEN TO A REINSTATED EMPLOYEE OF THE HIGHWAY PATROL.

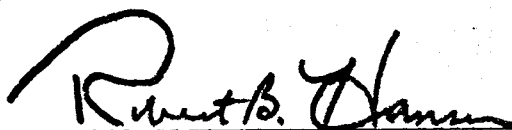
The challenged order does grant to the Commissioner the responsibility of determining at what rating or rank and in what position the petitioner should be employed if and when he is reinstated by a subsequent order of the Commission. Manifestly the Commissioner, who spends his full time administering the affairs of the Highway Patrol, is far better qualified to determine what employment of petitioner would best serve the interests of the Highway Patrol and the public it serves in light of the qualifications and performance of other officers and employees of the Highway Patrol than is the Highway Patrol Civil Service

Commission whose members devote but a very small portion of their working time to the affairs of the Patrol and who thus are not knowledgeable as to the day by day performance of officers and members of the Highway Patrol.

#### CONCLUSION

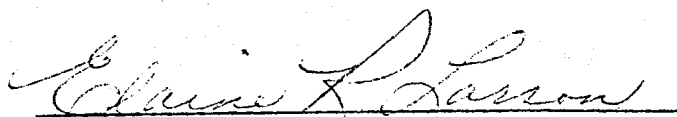
Petitioner lacks standing to challenge the subject order because he has not been injured by it. Petitioner has not exhausted his administrative remedy of seeking relief from any unfavorable ruling which might confer standing on him before this Court, and can not exhaust such remedies until the subject order is acted upon and becomes a final order. Accordingly, petitioner should be denied relief and his writ of certiorari should be dismissed.

Respectfully submitted,



Robert B. Hansen  
Attorney for Defendants and Respondents

Mailed a copy of the foregoing Respondents' Brief this 15<sup>th</sup> day of June, 1976, postage prepaid, to Robert M. McRae, Attorney for Plaintiff and Petitioner, 370 East Fifth South, Salt Lake City, Utah 84111.



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